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**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE CITY OF TULSA, and THE TULSA METROPOLITAN UTILITY AUTHORITY,
Plaintiffs

Vs.

01-CV-900-EAC

TYSON FOODS, INC., COBB-VANTRESS, INC., PETERSON FARMS, INC.,
SIMMONS FOODS, INC., CARGILL, INC., GEORGE'S, INC., and
CITY OF DECATUR, ARKANSAS,
Defendants

**POULTRY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION AND BRIEF
FOR PARTIAL SUMMARY JUDGMENT AGAINST POULTRY DEFENDANTS
ON ISSUE OF LIABILITY FOR GROWERS' DISPOSAL OF POULTRY MANURE
OR, IN THE ALTERNATIVE,
MOTION AND BRIEF TO STRIKE PLAINTIFFS' MOTION AND BRIEF FOR
PARTIAL SUMMARY JUDGMENT AGAINST POULTRY DEFENDANTS**

Gary V. Weeks
Vince Chadick (OB #15981)
James M. Graves (OB #16604)
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
(479) 521-9996

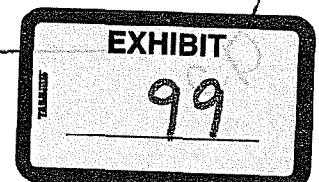
AND

Richard L. Carpenter, Jr. (OB #1504)
CARPENTER, MASON & MCGOWAN
1516 S. Boston Avenue, Suite 205
Tulsa, OK 74119-4013
(918) 584-7400

Attorneys for George's, Inc. and also
signing by consent of other Defendants

November 27, 2002

Exhibit 5



4:05-cv-00329
Oklahoma Ex. 3361

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
GENERAL FACTUAL BACKGROUND	1
INTRODUCTION	2
STATEMENT OF UNDISPUTED FACTS	3
DISCUSSION	17
PROPOSITION I	
THE POULTRY DEFENDANTS ARE NOT LIABLE FOR THE ACTS OF INDEPENDENT CONTRACT GROWERS IN THE WATERSHED BASED ON THEIR NORMAL AND EXPECTED CONTRACT OPERATIONS.....	17
PROPOSITION II	
LAND APPLICATION OF LITTER DOES NOT CONSTITUTE A NUISANCE <i>PER SE</i>	23
PROPOSITION III	
PLAINTIFFS HAVE FAILED TO SHOW THAT THE POULTRY DEFENDANTS ARE LIABLE AS A MATTER OF LAW FOR VIOLATING STATUTES REGARDING THE POLLUTION OF A MUNICIPAL WATER SUPPLY.....	25
POULTRY DEFENDANTS' MOTION TO STRIKE	26
CONCLUSION	28
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

Cases

<u>Amoco Pipeline Co. v. Herman Drainage Sys., Inc.,</u> 212 F.Supp.2d 710 (W.D. Mich. 2002)	19
<u>Bleeda v. Hickman-Williams,</u> 205 N.W.2d 85 (Mich. Ct. App. 1973)	18
<u>Carr v. Alta Verde Indus. Inc.,</u> 931 F.2d 1055 (5 th Cir. 1991)	23
<u>Concerned Area Residents for the Env't v. Southview Farm,</u> 834 F.Supp. 1410 (W.D.N.Y. 1993)	23
<u>Higbee v. Starr,</u> 598 F.Supp. 323 (E.D. Ark. 1984)	23
<u>McQuilken v. A&R Dev. Corp.,</u> 576 F.Supp. 1023 (E.D. Penn. 1983)	18-19
<u>Peairs v. Fla. Publ'g Co.,</u> 132 So.2d 561 (Fla. Ct. App. 1961)	20
<u>Shannon v. Mo. Valley Limestone Co.,</u> 122 N.W.2d 278 (Iowa 1963)	20
<u>Tankersly v. Webster,</u> 243 P.2d 745 (Okla. 1925)	21
<u>U.S. v. Aceto Agr. Chem. Corp.,</u> 699 F.Supp. 1384 (S.D. Iowa)	20
<u>Weinman v. DePalma,</u> 232 U.S. 571 (1914)	17

Statutes

27A O.S. § 2-6-105	24
50 O.S. § 1.1	25

Rules

FED. R. CIV. P. 12	26, 28
--------------------------	--------

Other Authorities

RESTATMENT (SECOND) OF TORTS § 427(B)	19
Wright & Miller, <i>Federal Practice and Procedure</i>	27

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

1. THE CITY OF TULSA,
 2. THE TULSA METROPOLITAN
UTILITY AUTHORITY,
- Plaintiffs

v.

Case No. 01-CV0900EA(C)

1. TYSON FOODS, INC.,
 2. COBB-VANTRESS, INC.,
 3. PETERSON FARMS, INC.,
 4. SIMMONS FOODS, INC.,
 5. CARGILL, INC.,
 6. GEORGE'S, INC.,
 7. CITY OF DECATUR, ARKANSAS,
- Defendants

**POULTRY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION AND BRIEF
FOR PARTIAL SUMMARY JUDGMENT AGAINST POULTRY DEFENDANTS
ON ISSUE OF LIABILITY FOR GROWERS' DISPOSAL OF POULTRY MANURE
OR, IN THE ALTERNATIVE,
MOTION AND BRIEF TO STRIKE PLAINTIFFS' MOTION AND BRIEF FOR
PARTIAL SUMMARY JUDGMENT AGAINST POULTRY DEFENDANTS**

Come now the Poultry Defendants, and for their Response to Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Growers' Disposal of Poultry Manure (hereinafter "Plaintiffs' Motion and Brief") and, in the alternative, for their Motion and Brief to Strike Plaintiffs' Motion and Brief, state as follows, to-wit:

GENERAL FACTUAL BACKGROUND

The background and general information regarding the plaintiffs' claims against the Poultry Defendants have been briefed at length by plaintiffs and the Poultry Defendants in their various motions and briefs filed to date. As such, for the purposes of this Response, instead of taking up more of this Court's valuable time reciting

background information already briefed, the Poultry Defendants hereby incorporate by reference the factual background information contained in their Joint Motions filed previously and the background information contained in their Joint Motion for Summary Judgment and Brief in Support.

INTRODUCTION

With regard to their Motion to Strike, plaintiffs' state that when this cause of action was filed on December 10, 2001, plaintiffs' entire theory of the case regarding liability of the Poultry Defendants for the acts of their independent contract growers in the Watershed was that the Poultry Defendants exercised control over their contract growers to such an extent as to negate the contract growers' independent contractor status. (Complaint, ¶¶ 17-22) Plaintiffs continued to assert this single theory of liability for six (6) months, including in their Amended Complaint. (See generally: Amended Complaint) Plaintiffs did not change their theory of liability on this issue nor did they plead the new theories they are now advancing in the instant Motion (e.g. employer is liable for acts of independent contractor that are inherently dangerous, or that the Integrators should be liable since they knew that a trespass or nuisance was likely to result from the Contract Growers' activities). (Amended Complaint, ¶¶ 17-22)

As plaintiffs succinctly state, "[m]uch time and effort has been devoted in discovery to the issue of whether these growers are truly independent contractors, given the degree of control exercised over their operations." (Plaintiffs' Motion and Brief for Partial Summary Judgment, p. 2)(emphasis added) However, now, for the very first time, plaintiffs assert a new and completely different theory of liability. For all of these

reasons, the Poultry Defendants request that the Court Strike the plaintiffs' Motion and Brief, or in the alternative deny the motion.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs submit Thirty-One (31) numbered paragraphs of "facts" which they allege are undisputed. Poultry Defendants dispute the following facts or necessarily complete the facts contained in the plaintiffs' Statement of Undisputed Facts.

1. Poultry Defendants acknowledge that they contract with growers who are independent contractors who raise poultry for the Poultry Defendants. The Poultry Defendants further acknowledge that they deliver baby birds to their contract growers, provide feed and medication for the birds, provide suggestions to improve each contract grower's performance, and pick the birds up prior to processing. Peterson disputes plaintiffs' statement that David Holcombe is a "representative" of Peterson. More correctly stated Mr. Holcombe is an employee of Peterson. (Deposition testimony of Peterson employee and grower, David Holcombe, Exhibit No. 1, p. 3)

2. Poultry Defendants acknowledge that the Poultry Defendants control the genetics and breeding stock of birds placed with their contract growers to attempt to achieve the highest performance for the contract growers and, in turn, improve the end product that each contract grower provides.

3. Poultry Defendants dispute this paragraph because it is argumentative and incorrectly equates manure and litter to be one and the same substance. Plaintiffs mischaracterize the testimony of David Holcombe, Peterson employee and grower, which is that it has generally been the practice in the industry for growers to either sell their chicken litter, give it away or apply it to their own land. Mr. Holcombe did not testify

concerning Peterson's knowledge of this practice or that such practice had been going on since the 1950's. (See: Plaintiffs' Motion and Brief in Support, Exhibit 3; Deposition testimony of Peterson employee and grower David Holcombe, pp. 58-59) Plaintiffs also mischaracterize Ron Mullikin's testimony. Mr. Mullikin, a former Peterson employee, not a "Peterson representative" as plaintiffs' denominate Mr. Mullikin, testified that he could only speculate that growers in the Northeast Oklahoma and Northwest Arkansas area had been land applying chicken litter for as long as they had been growing chickens, and that this could have been done for decades. (See: Plaintiffs' Motion and Brief in Support, Exhibit 5; Deposition testimony of Ron Mullikin, pp. 167-169)

4. Plaintiffs' mischaracterize Schaffer's testimony. The poultry industry has been aware of the environmental impact of nitrogen contained in chicken litter since the late 1980s but did not become aware of the environmental impact of phosphorus or phosphates contained in chicken litter until approximately the mid-1990s. (See: Plaintiffs' Motion and Brief in Support, Exhibit 4; Deposition of Tyson Representative, Archie Schaffer, p. 43, lines 20-25) The Poultry Defendants also dispute this paragraph because it mischaracterizes Mr. Simmons' testimony. The question that was posed to Mr. Simmons was a very broad question and did not contain "environmental impact" as a topic, nor did it contain phosphorus as a topic. The portion of Mr. Simmons' deposition which is attached to Plaintiffs' Motion and Brief in Support as Exhibit 7 reflects the true and correct question and answer exchange.

The Poultry Defendants also dispute this paragraph because the Plaintiffs' statement that the "poultry industry has been aware since at least the late 1980's" of potential environmental risks from the land application of chicken manure is misleading.

Until very recently, the primary concerns of agronomists and the NRCS has been nitrogen, not phosphorus. Agronomists, soil scientists, NRCS in multiple states, and various state agencies are in the process of developing appropriate guidelines for the land application of poultry litter with a present focus on phosphorus. In the past, the focus was primarily on nitrogen. In fact, Plaintiffs' designated expert in the area of soil science, Dr. Jarrell, admits that Nutrient Management Plans in his state are still nitrogen-based. (Deposition of Dr. Jarrell, Exhibit No. 2, pp. 22 – 24, ll. 20-10). Dr. Jarrell further explained that we now have better tools for understanding phosphorus that were not available in the past. (Deposition of Dr. Jarrell, Exhibit No. 2, p. 17, ll. 6-17). Many states are in the process of developing methods to determine appropriate guidelines for the land application of poultry manure. Dr. Jarrell plans to spend another two years to validate the Wisconsin phosphorus index. (Deposition of Dr. Jarrell, Exhibit No. 2, p. 24, ll. 7-10). While there is a recognition that a potential risk may be present, there is no consensus as to when land application of poultry litter actually poses a risk. The Poultry Defendants' expert agronomist, Dr. Tucker, testified that in his fifty years of experience, he has never found a field saturated with phosphorus. There is no data or evidence that fields or pastures with high Soil Test Phosphorus¹ readings cause any harm or loading to waters. (Deposition of Dr. Tucker, Exhibit No. 3, p. 31, and p.36).

Furthermore, Plaintiffs' statement that "the poultry industry is aware" is not supported by the record for purposes of the motion. In support of this contention, Plaintiffs' cite the deposition testimony of a Simmons' representative and a Tysons' representative. Plaintiffs decided to sue six companies that have operations in Northwest

¹ As explained in response to Plaintiffs' Motion for Partial Summary judgment on Issue of Liability Under CERCLA, response to Plaintiffs' statement of fact No. 18, the topic of "Soil Test Phosphorus" will

Arkansas. However, the poultry industry is certainly much larger than the six Defendants Plaintiffs sued and the two representatives Plaintiffs' cite for purposes of this motion.

5. Plaintiffs' mischaracterize Mr. Schaffer's testimony. His testimony was that the document adopted by Tyson and referred to in this paragraph was used to educate Tyson's contract growers on Best Management Practices in general. (See: Plaintiffs' Motion and Brief in Support, Exhibit 4; Deposition of Tyson Representative, Archie Schaffer, p. 46, lines 12-14) Mr. Schaffer did not state that the document was adopted or otherwise used to educate the growers about potential environmental risks from land application of poultry manure and litter.

6. The Poultry Defendants dispute Plaintiffs' characterization or summary of the seminar materials. The seminar materials (See: Plaintiffs' Motion and Brief, Exhibit 9) are of no less than thirty-five (35) pages and contain numerous findings. Plaintiffs' attempt to distill those reports down to four (4) conclusions which Plaintiffs' believe are beneficial to their arguments herein is improper and inaccurate. The 1994 paper from a research conference is interesting, but does not support any statement of fact material to this Court's ruling. Plaintiffs provide no explanation as to the origin of this document, the nature of the "research conference" from which this document appears to be generated, who was invited to attend the conference and who actually attended. Plaintiffs fail to demonstrate that any representatives of the Poultry Defendants had any knowledge of the "research conference" or this paper. Furthermore, the referenced seminar materials constitute inadmissible hearsay, and accordingly any references to these materials should be stricken as an improper basis for summary judgment.

be the subject of extensive expert testimony at trial.

In addition, the paper shows that at the time it was published, phosphorus research was still developing. One of the presenters at this "research conference" advised that "soils and management practices that are vulnerable to P (phosphorus) loss, must be identified to implement effective and economically viable management systems that minimize P transport." (See: Plaintiffs' Motion and Brief in Support, Exhibit 9, p. 3) This demonstrates that at the time the paper was published, these management practices were being identified and researched by these scientists. The paper certainly does not go so far as to make specific recommendations relating to the soils in this Watershed. Furthermore, the paper does not demonstrate any type of consensus among the experts as to what might be considered excessive phosphorus levels. This study of phosphorus reactions in the soil and water is still developing and will be the subject of extensive expert testimony at trial.

7. Poultry Defendants dispute the plaintiffs' summary of the Poultry Water Quality Consortium's findings because the plaintiffs ignore significant and relevant aspects of the report. (See: Plaintiffs' Motion and Brief, Exhibit 10) For example, the report recognized that:

Properly managed poultry wastes from manure, litter, dead birds, and wastewater are profitable farm investments. An effective waste management plan provides for the proper collection, storage, handling, and use of poultry waste. Products produced from wastes reduce chemical fertilizer costs, improve soil quality, and protect water resources, air quality, and human and animal health.

Nonetheless, the referenced third-party materials constitute inadmissible hearsay, and accordingly any references to these materials should be stricken as an improper basis for summary judgment.

8. Plaintiffs mischaracterize the report entitled, "Confined Animal Inventory: Lake Eucha Watershed." (See: Plaintiffs' Motion and Brief, Exhibit 11) The report contains numerous findings, but Plaintiffs' statement of fact attempts to distill the report down to one (1) conclusion. Moreover, plaintiffs use this report as the basis for "undisputed" statements of fact and further rely upon it in their argument, yet the report amounts to hearsay and the calculations contained within it are flawed. The report is flawed because, for example, it states "[o]ur calculations assume that growers are running their houses at maximum capacity, but this is often not the case. Many growers will only raise three or four flocks a year rather than five which is the maximum possible." (See: Plaintiffs' Motion and Brief, Exhibit 11, p. 3) The report should further be excluded from business because it cannot be admitted into evidence in lieu of plaintiffs' experts' own opinions and testimony. This Court should exclude this report in its entirety when viewing this Motion because the plaintiffs are attempting to use it against the Poultry Defendants as if it were an additional expert witness report. However, it is not a report of a designated expert and the Poultry Defendants have not been able to depose the report's author prior to trial and they will not be able to cross-examine the author at trial. As an unsponsored, unsubstantiated, and unreliable expert witness report, it should be excluded in its entirety.

9. For the same reasons set forth in paragraph 8, *supra.*, the Poultry Defendants dispute this report and plaintiffs' reliance on it as a basis for "undisputed" facts and argument. (See: Plaintiffs' Motion and Brief, Exhibit 12)

10. Poultry Defendants dispute this paragraph because it omits probative and relevant information contained in the referenced Exhibit. (See: Plaintiffs' Motion and Brief, Exhibit 13) For example, the plaintiffs omit that Mr. Wagner identified wastewater

treatment plants, cattle operations, human waste and background sources as other potential sources of phosphorus. Poultry Defendants further dispute this paragraph with respect to the contributions Mr. Wagner attributes to the Poultry Defendants because those approximations were compiled and supplied by Mr. Wagner who the Poultry Defendants have no control over and whose calculations the Poultry Defendants cannot verify and therefore cannot admit to the them.

11. Poultry Defendants dispute Plaintiffs' characterization or summary of the referenced letter. (See: Plaintiffs' Motion and Brief, Exhibit 14) The letter consists of numerous paragraphs that make multiple points. Plaintiffs' biased summation of the letter in two sentences is improper and inaccurate.

12. Poultry Defendants dispute Plaintiffs' characterization or summary of the letter. (See: Plaintiffs' Motion and Brief, Exhibit 15) The letter contains numerous estimations, calculations and approximations and plaintiffs' attempt to summarize it in only two sentences is improper and inaccurate. Furthermore, the referenced third-party communication constituted inadmissible hearsay, and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

13. Poultry Defendants dispute this paragraph because it is incomplete and an inaccurate representation of the information contained in the memorandum. (See: Plaintiffs' Motion and Brief, Exhibit 16) The quotation provided by plaintiffs is incomplete and is disputed because the plaintiffs omitted five full paragraphs of the memorandum. Plaintiffs' reduction of the memorandum to a meager portion they deem useful is an inaccurate statement of fact. Furthermore, the referenced third-party

communication constituted inadmissible hearsay, and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

14. Poultry Defendants dispute this paragraph because the quotation provided is incomplete and is disputed in the absence of the following information needed to make it complete. (See: Plaintiffs' Motion and Brief, Exhibit No. 17) At the "****" plaintiffs omitted the following:

The Oklahoma Broiler Council has proposed an eight point plan for a cooperative approach to poultry litter management. The Oklahoma Department of Agriculture has accepted this proposal with some modifications. The ODA is presently writing regulations to put the plan into action. ****

Following the last sentence of the quotation provided by plaintiffs', the plaintiffs' omitted the following:

If you have applied and are waiting for your plan to be formalized, please continue to use the "Dry Poultry Litter Handling Best Management Guidelines."

15. Poultry Defendants dispute the quoted portion of the letter referred to in plaintiffs' Statement No. 15 because it states in the final paragraph "Please write a letter to Governor Keating as soon as possible and tell him that you are concerned about water quality and the environment . . ." not "water quality in the environment" as stated by plaintiffs. (Plaintiffs' Exhibit 18).

16. Poultry Defendants dispute plaintiffs' biased abstract of the Task Force's Final Report. (See: Plaintiffs' Motion and Brief, Exhibit No. 19) That is a report containing numerous findings, but plaintiffs' attempt to summarize only a portion of it. Furthermore, the referenced third-party communication constituted inadmissible hearsay,

and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

17. Poultry Defendants acknowledge that a meeting occurred on or about December 5, 1997 and that at that meeting plaintiffs' and some of the Poultry Defendants discussed Tulsa's water supply. (See: Plaintiffs' Motion and Brief, Exhibit No. 20) Poultry Defendants dispute this paragraph to the extent that it makes inaccurate representations of the minutes of the recorded minutes of that meeting. Furthermore, the referenced third-party communication constituted inadmissible hearsay, and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

18. Poultry Defendants dispute plaintiffs' characterization and summary of this letter. (See: Plaintiffs' Motion and Brief, Exhibit 21) The letter is a lengthy response to concerns voiced by plaintiffs during their meeting with some of the Poultry Defendants on December 5, 1997. The letter contains a detailed twelve (12) step process responding to plaintiffs' concerns. Plaintiffs' quotation of only one introductory paragraph is improper and inaccurate. Furthermore, the referenced third-party communication constituted inadmissible hearsay, and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

19. Poultry Defendants dispute this paragraph because the information provided in this paragraph is incomplete and is disputed in the absence of noting that after the growers were informed of potential problems with land application of litter, they were encouraged to apply for a Farm Management Plan and encouraged to have soil samples taken before spreading any poultry litter.

20. Tyson Foods admits this paragraph.

21. Poultry Defendants dispute this paragraph because the quotation provided is incomplete and disputed in the absence of the following. (See: Plaintiffs' Motion and Brief, Exhibit 24) At the *** plaintiffs omitted the following brief but important sentence: "Your serviceman can help you with this." The following paragraph was also omitted:

If you haven't already done so, we strongly urge you to contact your Natural Resources Conservation Service (the old Soil Conservation Office) and request that they help you develop a Nutrient Management Plan. Doing this can help the industry avoid government regulations that could make litter handling even more difficult.

Plaintiffs' biased summarizations of documents and meetings, their quotation out of context of letters, reports, and memoranda, and their deliberate censorship of references that negate their argumentative versions of facts are improper and inaccurate.

22. Poultry Defendants dispute this paragraph because plaintiffs' Statement No. 22 is incomplete and misleading. Ron Mullikin, a former Peterson employee, explained at his deposition when questioned about the first sentence quoted by plaintiffs in Statement No. 22, "I think the statement there was one where I didn't feel equipped, didn't feel like I knew enough about everything that was going on to have an opinion about it." (Deposition of Ron Mullikin, Exhibit No. 4, p. 75) Mr. Mullikin testified that he left Peterson in August, 2000, and that he currently is employed by Wal-Mart. Mr. Mullikin stated that he had gone to work for Peterson as director of training in November, 1997, and came to have human resources and environmental responsibilities six to nine months later and did not have a background in the poultry industry. (Deposition of Ron Mullikin, Exhibit No. 4, pp. 15, 17-18, 20) In his deposition, Mr. Mullikin stated that the

first meeting that he attended concerning the growing issue of poultry litter and concerns are over problems that it could be creating was in February or March of 1998 with attendees from the States of Oklahoma and Arkansas, the USDA and the University of Oklahoma and OSU. Mr. Mullikin further testified that the ideas and perceptions presented at the meeting no one could really substantiate and what he recalls from the first meeting is almost confusion trying to understand what the problem was, what all the determining factors were and what all the inputs were. (Deposition of Ron Mullikin deposition, Exhibit No. 4, pp. 21-22, 29) A section of the Opinions on the Poultry Litter Issues Memo not quoted in Statement No. 22, states "We are also faced with a lack of science to help us understand where we are, and where we need to go. Agronomists can't agree on the movement of phosphate, the water solubility of the P in the litter, and means of making P more efficient in our feeds. How much P in our soils is too much? Agencies can't agree on max. soil levels. And if they could agree, how would they measure it? In our few check samples, we demonstrated how hard it is to get a good accurate sample." (See: Plaintiffs' Motion and Brief, Exhibit 25).

23. Poultry Defendants dispute this paragraph because plaintiffs' Statement No. 23 again incorrectly refers to Peterson's former employee Ron Mullikin as a "Peterson representative." Statement No. 23 is again incomplete and misleading. The memorandum referred to in Statement No. 23, whose subject is "Spavinaw Watershed Waste Management Plan Meeting," describes a meeting held to help growers in developing their own waste management plan which was sponsored by the NRCS and the Extension Service. (See: Plaintiffs' Motion and Brief, Exhibit 26) Mr. Mullikin in his deposition explained the phosphorus limit of 300 pounds referred to in the memorandum.

"The 300 pounds was an arbitrary number. It was a number that, once again, [was] not based on science. It was a number that someone -- I don't recall if it was the NRCS. I don't recall if it was the extension service, whether it was -- I think in the State of Oklahoma it was mandated by legislation." (Deposition of Ron Mullikin, Exhibit No. 4, , p. 113)

24. Poultry Defendants dispute this paragraph because plaintiffs' Statement No. 24 incorrectly refers to former employee Ron Mullikin as "Peterson's environmental representative." In response to the deposition question posed by plaintiffs' counsel, "Did you come to some belief by the time you left the company as to what portion or percentage of the problem might be caused by the poultry industry?" Mr. Mullikin answered "I believe that there could be phosphate in the lake that came from the soils that had poultry litter applied to them; but to be able to exact those numbers, I wouldn't -- I don't think anybody can." (Emphasis added). (See: Plaintiffs' Motion and Brief, Exhibit 5; Mullikin deposition, pp. 40-41) During plaintiffs' counsel's deposition questioning of Mr. Mullikin concerning a December, 1997 U.S. Senate report concerning the potential for animal waste pollution, the following colloquy occurred:

Q. Would you look at page 4? I think it's the next page maybe, at the bottom talking about environmental impact. They first talk about spills directly into the water have an impact. It goes on to say 'In addition, the excessive growth and decay of algae and other aquatic organisms that feed on excessive nutrients in water deplete dissolved oxygen. The resulting hypoxia (low oxygen) from chronic nutrient enrichment can result in fish kills, odor and overall degradation of water quality'. (Emphasis added). Do you agree with that statement, Mr. Mullikin?

A. Based on what I know, yes.

Q. Did you know that in February of 1998 when you started this job?

A. Yes.

(Deposition of Ron Mullikin, Exhibit No. 4, pp. 68-69) Finally, plaintiffs mischaracterize in misleading fashion, Mr. Mullikin's memo dated November 24, 1998 and deposition testimony concerning this memo. Mr. Mullikin's frustration is not due to lack of action to address the issues as argued by plaintiffs in Statement No. 24, but rather with his inability to find any new solutions to the issues. As he states in his final paragraph of this memo: "I realize once again I've come with no new solutions, but we continue to look at anything that may solve all or part of our problem." (See: Plaintiffs' Motion and Brief, Exhibit 5; Mullikin deposition pp. 142-144 & Exhibit 27, memo dated November 24, 1998)

25. Poultry Defendants dispute this paragraph because plaintiffs misstate and mischaracterize the deposition testimony of David Holcombe in plaintiffs' Statement No. 25. Mr. Holcombe testified that at the 1999 Peterson meeting with growers, there were general comments about the water, the issues that were facing the industry and telling the growers that there were issues out there to be concerned with and to make sure that the growers applied their litter according to their waste management plans. Mr. Holcombe testified that the main part of the discussion was how the growers were going to work with their litter, what the growers did with their litter and how to apply the litter. The growers were told that water quality was an issue that they needed to be concerned about. (See: Plaintiffs' Motion and Brief, Exhibit 3; Holcombe Deposition, pp. 60-62)

26. Poultry Defendants do not dispute that Cargill met with its contract growers on a regular basis to provide education, guidance, and best management practices on waste management and disposal matters.

27. Poultry Defendants dispute this paragraph because it is incomplete. It is incomplete because the plaintiffs omitted the following before the quoted portion provided by the plaintiffs begins:

It was because we were so involved with the City of Tulsa looking at the lake and quality, and so our first deal was that we can take our litter out.

The plaintiffs also omitted the following, which should be included in the plaintiffs' "quote" following the first ***:

We did it [because] it was something that we could do. We were trying to identify what we could do to help solve the problem. And so we said we don't have all the answers, but we can take our litter out, and we were trying to educate our growers through meetings. Extension people helped put those meetings on too.

28. Tyson Foods admits this paragraph.

29. Tyson Foods admits this paragraph.

30. Poultry Defendants dispute this paragraph because the quotation provided in this paragraph is incomplete and disputed in the absence of the following. At the *** plaintiffs omitted the following portion of the quotation: "[w]e are a little chagrined that we have received no acknowledgement of that effort (much less credit) from the Tulsa World and others, who refuse to accept the fact that there are lots of other contributors of phosphorous to the watershed, in addition to poultry."

31. With respect to Paragraph Thirty-One of the plaintiffs' Statement of Undisputed Facts, the Poultry Defendants dispute this paragraph because the quotation is incomplete and disputed in the absence of the following. At the *** plaintiffs omitted the following portion of the quotation: "[t]he practice of rotating crops and application sites will help remove excess phosphorus. Maintaining soil pH between 6.0 and 7.0, maximizes plant phosphorus uptake, thereby reducing accumulations."

DISCUSSION

PROPOSITION I

THE POULTRY DEFENDANTS ARE NOT LIABLE FOR THE ACTS OF INDEPENDENT CONTRACT GROWERS IN THE WATERSHED BASED ON THEIR NORMAL AND EXPECTED CONTRACT OPERATIONS.

- A. Plaintiffs' Legal Authorities Do Not Establish a Basis for the Court to Override the Independent Contractor Status of Contract Growers.

Plaintiffs hope to convince the Court to enforce a limited exception to the general rule that an employer is not liable for the acts of an independent contractor. The caselaw and authorities offered by plaintiffs have little or no persuasive value because they are either wholly irrelevant or factually distinguishable.

In Weinman v. DePalma, 232 U.S. 571 (1914), the United States Supreme Court did identify an exception to the general rule of no liability for the acts of an independent contractor where the "work performed itself" is a nuisance or injures or destroys the property of another. Id. at 576 This statement helped create what is now referred to as the inherently dangerous activity exception to the general rule of no liability.

In attempting to apply the exception of Weinman to the factual circumstances of contract growers, plaintiffs stretch the holding of Weinman beyond the breaking point. The Weinman exception is not, as the plaintiffs would have the Court believe, that the employer is liable if a nuisance is likely to result; instead, the exception states that where the work actually performed is a nuisance or injures or destroys the property of another, the principal can be liable. Here, that is not the case because the work actually performed under the contract (i.e. growing chickens) does not inherently result in any nuisance.

Plaintiffs offer the case of Bleeda v. Hickman-Williams, 205 N.W.2d 85 (Mich. Ct. App. 1973), and a series of similar cases, all of which are factually distinguishable because in none of them is there a bargained for exchange between the employer and the independent contractor whereby the independent contractor gains control of the item or substance that a plaintiff alleges causes the nuisance. Additionally, in none of the cited cases does the alleged nuisance-causing substance have economic value to the independent contractor. In Bleeda, the employer was found liable for acts that occurred while the independent contractor delivered its employer's product to its employer's customers. Bleeda, 205 N.W.2d at 87

Here, that is simply not the case as the alleged nuisance occurs when the contract grower exercises its exclusive ownership and control over litter. It is not until after the contract growers have completed their work (i.e. growing chickens) that the alleged nuisance could potentially arise.

In Bleeda, the employer knew that the process itself caused a nuisance (it created dust and odor), but continued to use the services of the independent contractor to size and screen its coke and ultimately deliver it to the employer's customers (a fact not present herein). Here, the Poultry Defendants contract with their contract growers to raise chickens, and the contract growers are the contractual owners of litter. It is not until the grower asserts control over the litter that the alleged nuisance can arise. It is not the work contracted to be performed that creates the alleged nuisance; it is a separate and distinct act that creates the alleged nuisance.

In McQuilken v. A&R Dev. Corp., 576 F.Supp. 1023 (E.D. Penn. 1983), the court found that the employer of an independent contractor can be liable when the contractor is

employed to do work that the employer knows or has reason to “recognize that, in the ordinary course of doing the work ... the trespass or nuisance is likely to result.” McQuilken, 576 F.Supp. at 1033; quoting RESTATEMENT (SECOND) OF TORTS § 427B (Plaintiffs’ Motion and Brief, p. 21) Here, in the ordinary course of contracting with independent growers to raise chickens, there is no way for the Poultry Defendants to know or have reason to know that a nuisance or trespass will occur. As acknowledged, poultry litter has long been recognized as a valuable soil supplement for agronomic uses, which the contract growers are free to use as permitted by their nutrient management plans, or to sell for the use by others. Again, the Poultry Defendants have a right to assume that under the contract that the grower will make use of the litter in a manner consistent with applicable law.

Plaintiffs rely on Amoco Pipeline Co. v. Herman Drainage Sys., Inc., 212 F.Supp.2d 710 (W.D. Mich. 2002)(Plaintiffs’ Motion and Brief, p. 17), as a basis for ignoring independent contractor status. Because the Amoco case involves the “abnormally dangerous activities” exception, it has little relevance to the matter at hand, as it has not been pled by plaintiffs that either the raising of poultry or the application of litter is inherently dangerous. In Amoco, an employer / farmer employed an independent contractor to excavate a site on his farm. The farmer had actual knowledge of a petrochemical pipeline that cut through the farm his property near the location of the excavation but failed to inform the independent contractor of the existence of the pipeline. The Poultry Defendants cannot be aware of this type of special risk or abnormally dangerous activity because one simply is not present and as such this case has

little if any precedential persuasive value to the matter at hand, and thus the case does not support the plaintiffs' contention.

Another case of plaintiffs' involving the "inherently dangerous activities" exception is U.S. v. Aceto Agr. Chem. Corp., 699 F.Supp. 1384 (S.D. Iowa). (Plaintiffs' Motion and Brief in Support, p. 18) The Aceto case addresses the manufacture and disposal of pesticides and pesticide by-products and whether an employer arranged for the disposal of hazardous waste by-products under the guise of the contract. Aceto, 699 F.Supp. at 1387, 1389 The Aceto case concerned the disposal of a substance listed as hazardous under CERCLA. Conveniently, via their Motion in Limine, the plaintiffs are attempting to prevent the Poultry Defendants from showing a jury that litter is not classified as hazardous under any regulatory scheme. At any rate, because litter is not hazardous under CERCLA and is in no way abnormally dangerous, the cited case is absolutely irrelevant to the case at bar.

The court in Shannon v. Mo. Valley Limestone Co., 122 N.W.2d 278 (Iowa 1963), recognized that an employer of independent contractors has a duty to suppress a nuisance created by its independent contractors where the work being performed is the cause of the nuisance. Id. at 280 (Plaintiffs' Motion and Brief, p. 18) This proposition is also found in the case of Peairs v. Fla. Publ'g Co., 132 So.2d 561 (Fla. Ct. App. 1961) where the court stated where an employer gains knowledge of a "dangerous situation," it may be liable if it fails to halt or correct the situation. Peairs, 132 So.2d at 565 (Plaintiffs' Motion and Brief, p. 20) Herein, even if the work performed (growing chickens) did cause the alleged nuisance, which it does not, the work did not create the alleged nuisance in all situations. In fact, many of the farmers in the Watershed transport their

litter out of the Watershed and thus cannot contribute even theoretically to the alleged nuisance. Furthermore, there is a marketplace for poultry litter, whereby third parties buy the litter for their own uses, both within and without the Watershed, all of which is clearly outside the control of the Poultry Defendants. The alleged nuisance complained of by the plaintiffs does not amount to a “dangerous situation” or abnormally dangerous activity – in fact, plaintiffs’ own experts will testify that the phosphorus from any one area receiving litter in and of itself is most likely not damaging to the environment, but is only damaging if it reaches certain concentrated levels in a given geographical area in the aggregate from all sources. Thus, poultry litter is not inherently or abnormally dangerous or a nuisance in and of itself.

Moreover, even if an alleged nuisance or dangerous situation did arise in every situation, which it does not, when the Poultry Defendants became aware of concerns regarding phosphorus in the Watershed, they implemented Best Management Practices and other measures to abate prospective or alleged nuisances, despite the fact that the alleged nuisance (i.e. all phosphorus from all sources aggregated in the watershed) was not created by the Poultry Defendants’ conduct. If anything, the Poultry Defendants acted voluntarily to help educate the contract growers on litter management, and they cannot be held liable under the cases presented by plaintiffs because, in all of those cases, plaintiffs rely upon an employer’s failure to act to abate or control the nuisance created by the acts of its contractors.

After touching upon the law of numerous and non-controlling jurisdictions, plaintiffs finally address Oklahoma law in one paragraph on pages 21-22 of their Motion and Brief. In 1925, the Oklahoma Supreme Court found that an employer is subject to

liability where actions in conformance with the ordinary performance of a contract necessarily or naturally result in a nuisance. Tankersly v. Webster, 243 P.2d 745, 747 (Okla. 1925)(Plaintiffs' Motion and Brief, p. 21) This case is also without precedential value as the Tankersly court noted that the rule plaintiffs urge on this Court did not even apply in that case. Plaintiffs have failed to produce any Oklahoma case that applies the rule mentioned in Tankersly. Moreover, the Tankersly is further inapplicable because it, too, involved an abnormally dangerous situation, not an alleged nuisance or trespass.

For numerous reasons the plaintiffs' argument that this exception applies is misplaced. Case law and facts at hand demonstrate the following:

1. No Oklahoma case has applied the exception in the manner in which plaintiffs' urge on this Court. The only case from Oklahoma that plaintiffs' cite for a similar proposition is almost eighty years old, does not apply factually, and does not adopt the rule plaintiffs seek to impose upon the Poultry Defendants.
2. The Poultry Defendants were not aware until the 1990's that phosphorus presented potential problems to the Watershed; the Poultry Defendants then began implementation of measures to educate their contract growers about litter management issues and to prevent and abate phosphorus concerns. Even, plaintiffs admit that it was not until 1996 or 1997 that the Poultry Defendants became aware of potential problems presented by phosphorus. (Plaintiffs' Motion and Brief, p. 22) Plaintiffs' repeated and unfounded allegations that Poultry Defendants have known for decades about this problem are both erroneous and irrelevant, as they are only red herrings put forth to confuse the issue.
3. The Poultry Defendants have taken tangible, reasonable steps to restrict the amounts of phosphorus generated in the Watershed through land application operations within the limits allowed by their contracts with their growers. The fact of the matter is that the plaintiffs are so fixated on poultry operations that they will only be satisfied with the total cessation of all poultry operations in

the Watershed, an action that would not help the Water Supply in the short term, but would certainly be economically devastating to numerous independent contract growers who are not before this Court.

These facts in no way trigger the exception with which plaintiffs proselytize the Court. For all of these reasons, this Court should decline to apply the plaintiffs' proposed exception and, accordingly, the Court should deny the plaintiffs' Motion for Partial Summary Judgment on this issue.

PROPOSITION II

LAND APPLICATION OF LITTER DOES NOT CONSTITUTE A NUISANCE *PER SE*.

A. Plaintiffs' Legal Authorities Do Not Establish a Basis for the Court to Find as a Matter of Law that Land Application of Poultry Litter is a Nuisance *Per Se*.

1. Caselaw cited by plaintiffs does not establish that poultry litter is a nuisance *per se*.

Throughout their pleadings plaintiffs continually refer to manure and litter interchangeably as if they are the same substance, when that simply is not the case. However, because litter is a combination of manure and rice hulls or wood chips on an approximately 50-50 ratio, the two substances are quite distinct. Plaintiffs continuing referral to the substances as being equal is merely inflammatory, and erroneous.

Plaintiffs' cite three (3) cases for the proposition that animal manure (not poultry litter) has been found to be a pollutant. (Plaintiffs' Motion and Brief, p. 23) Those cases are: Concerned Area Residents for the Env't v. Southview Farm, 834 F.Supp. 1410 (W.D.N.Y. 1993)("CARE") reversed 34 F.3d 114; Carr v. Alta Verde Indus. Inc., 931 F.2d 1055 (5th Cir. 1991)(NPDES permit case); and, Higbee v. Starr, 598 F.Supp. 323 (E.D. Ark. 1984). However, CARE and Higbee are the only cases even remotely on

point regarding manure (not litter) as a pollutant. In each of these cases, the issue is the classification of liquid (not solid) swine waste that falls directly from swine contained in a Confined Animal Feeding Operation through floor "slats" and into holding lagoons without being mixed with any substance (e.g. rice hulls or shavings) to begin breaking down and diluting the nutrients contained in the waste. In each of the cases relied upon by plaintiffs for this proposition, the manure was not a solid, and was not mixed with any other substance to reduce or change its composition, making it potentially more susceptible to runoff. Here, plaintiffs are attempting to have litter equated to liquefied swine manure and/or attempt to treat litter the same as manure under the Clean Water Act and the cases cited in their Brief, which is simply not the case and is merely an effort to mislead the Court by clouding the issue with irrelevant comparisons. The two substances differ to such a fundamental extent that they cannot be considered equivalents for purposes of rhetoric or for application of case law.

2. Oklahoma Statutes cited by plaintiffs do not establish that poultry litter is a nuisance *per se*.

Plaintiffs' hope to convince the Court to trigger the public nuisance provisions of Oklahoma law based on invocations of statutory definitions which include manure (not poultry litter) as a pollutant. Plaintiffs' attempt is misplaced.

First, Title 27A, Section 2-6-105, in addition to the terms relied upon by the plaintiffs, further requires that where the Executive Director finds that water has been polluted he should order the pollution to cease or order actions intended to prevent the pollution in the future. 27A O.S. §2-6-105(B) In this matter the Executive Director has not made any such finding or order.

Moreover, as acknowledged by the plaintiffs, there is no conflict between section 27A and the general public nuisance law found in Title 50 of the *Oklahoma Statutes*. (Plaintiffs' Motion and Brief in Support, p. 25) Section 1.1 of Title 50 provides:

Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety.

50 O.S. §1.1(B)

Here, the actions plaintiffs complain of do not constitute a nuisance. To date, it has not been established that the manner in which the contract growers handle their litter has (beyond mere allegations) a substantial adverse affect on public health or safety. As such, litter application in the Watershed and the alleged consequences of that application by the contract growers is reasonable and does not amount to a nuisance *per se*. Because the Poultry Defendants have not allowed manure to enter waters of the State of Oklahoma and because litter application practices of contract growers have always been consistent with good agricultural practices, land application of litter is not a nuisance *per se*.

PROPOSITION III

PLAINTIFFS HAVE FAILED TO SHOW THAT THE POULTRY DEFENDANTS ARE LIABLE AS A MATTER OF LAW FOR VIOLATING STATUTES REGARDING THE POLLUTION OF A MUNICIPAL WATER SUPPLY.

Plaintiffs failed to show that the Poultry Defendants are liable under the "normal and expected contract operations" exception to the general rule that there is no liability for an employer of an independent contractor, or that the "abnormally dangerous activities" exception applies. Plaintiffs have failed to show that litter (not manure) is

considered by any of the authorities (e.g. CWA, RCRA, case law, and/or statutes) to be a pollutant or otherwise considered to be a hazardous substance. Plaintiffs have also failed to show that the agriculture practices engaged in by the contract growers in the Watershed are not consistent with good agricultural practices. As such, plaintiffs' failed to show that there is no genuine issue regarding each of those facts and, accordingly, they are not entitled to judgment as a matter of law as to any of them.

POULTRY DEFENDANTS' MOTION TO STRIKE

Alternatively to denying Plaintiffs' Motion and Brief, the Poultry Defendants assert that because the plaintiffs have not raised this theory of the case at any time prior to this Motion, this Motion should, in the interest of not rewarding unfair surprise and in the interests of fair play and substantial justice, be stricken in its entirety.

Rule 12(f) of the Federal Rules of Civil Procedure states in pertinent part as follows:

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or ... upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f) (Supp. 2000)(emphasis added).

Rule 12(f) provides a court the impetus to strike, either by its own initiative or upon proper motion, redundant, immaterial, impertinent, or scandalous information contained in any pleading or to strike the pleading in its entirety. A Rule 12(f) Motion does not challenge the pleading on its face, but merely challenges the timeliness, relevance and / or materiality of information contained in the pleading. The motion may be used to strike allegations or information in the pleading that do not help understand the plaintiff's claim for relief and/ or do not perform some other useful purpose in promoting the just disposition of the litigation.

See Wright & Miller "Federal Practice & Procedure" § 1380-1382. In addition, Rule 12(f) motions are used to challenge allegations and information contained in the pleading that are unworthy of consideration by the court because they are so unrelated to the plaintiff's cause of action that it would be unnecessary, burdensome, or unjust to require a defendant to respond.

Via their Motion and Brief, plaintiffs for the very first time, just two months out from trial, present a radically different theory of the case from that which they have relied on or disclosed to date. Until the plaintiffs filed their Motion and Brief they have relied solely upon their contention that the Poultry Defendants exercise so much control over their contract growers that the contract growers are not actually independent contractors but are agents of the Poultry Defendants. This assertion was the basis of their theory of liability in their original Complaint and in their Amended Complaint. (See generally: Complaint, ¶¶ 17-22 & Amended Complaint, ¶¶ 17-22)

Now, apparently recognizing flaws in their argument, plaintiffs attempt to change course and assert a new and dramatically different theory of liability. They did not choose to assert this theory of liability until they filed the instant Motion, after depositions and discovery were completed or near completion, and thus the theory has not been investigated during the discovery process. If plaintiffs had disclosed this theory of liability at an earlier juncture then it would have drastically altered the Poultry Defendants discovery process, theories of the case, and defense strategy. Additionally, plaintiffs' new theory would have required additional discovery regarding the scientific aspects of the argument and the validity inquiries into the remote authorities relied upon by the plaintiffs regarding their argument.

In short, plaintiffs ambushed the Poultry Defendants with a new theory of liability that Poultry Defendants cannot properly defend against because discovery is closed. For these reasons, the Poultry Defendants request that this Court strike plaintiffs' Motion and Brief pursuant to Rule 12(f) of the *Federal Rules of Civil Procedure*.

CONCLUSION

Plaintiffs have failed to show that there is an absence of material fact with regard to the alleged liability of the Poultry Defendants. Plaintiffs did not establish the normal and expected contract operations exception to the general rule that there is no liability for the acts of independent contractors. Plaintiffs failed to prove that litter (not manure) is a pollutant or hazardous material, beyond mere broad allegations. As such, the Poultry Defendants are not liable as a matter of law under any of the theories presented by the plaintiffs in their Motion and Brief. In the alternative, because the theory of recovery presented by the plaintiffs is radically different than any theory asserted to date, the Poultry Defendants request that the Court strike plaintiffs' Motion and Brief in its entirety.

WHEREFORE, PREMISES CONSIDERED, the Poultry Defendants respectfully request that this Court deny Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Growers' Disposal of Poultry Manure or, in the alternative, that the Court will grant the Poultry Defendants' Motion to Strike Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Growers' Disposal of Poultry Manure, and they further request any and all other relief to which they may be entitled.

By:

Gary V. Weeks
Vince Chadick (OB #15981)
James M. Graves (OB #16604)
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
(479) 521-9996

AND



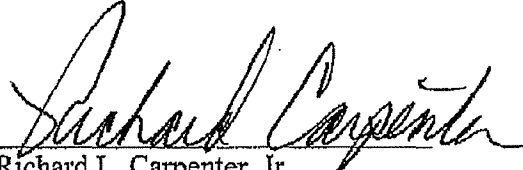
Richard L. Carpenter, Jr. (OB #1504)
CARPENTER, MASON & MCGOWAN
1516 S. Boston Avenue, Suite 205
Tulsa, OK 74119-4013
(918) 584-7400

Attorneys for George's, Inc. and also
signing by consent of other Defendants

CERTIFICATE OF SERVICE

This is to certify that I have on this day served counsel for all parties in the foregoing matter with a true and correct copy of this pleading by depositing in the United States mail a copy properly addressed with adequate postage thereon.

DATED this 27th day of November, 2002.


Richard L. Carpenter, Jr.

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0001

1 IN THE UNITED STATES DISTRICT COURT FOR THE
2 NORTHERN DISTRICT OF OKLAHOMA

3 THE CITY OF TULSA)
4 2. THE TULSA METROPOLITAN
UTILITY AUTHORITY,

5 Plaintiffs,

6 vs.

Case No. 01 CV 0900B(X)

7 1. TYSON FOODS, INC.,
8 2. COBE-VANTRESS, INC.,
9 3. PETERSON FARMS, INC.,
10 4. SIMMONS FOODS, INC.,
5. CARGILL, INC.,
6. GEORGE'S, INC.,
7. CITY OF DECATUR, ARKANSAS,

11 Defendants.

12
13
14 DEPOSITION OF DAVID LEE HOLCOMBE
15 Taken at 221 North College, Fayetteville, Arkansas,
16 on August 8, 2002, at 9:00 a.m.
17
18
19
20
21
22
23
24
25

0002

APPEARANCES

1 MR. ROBERT L. ROARK FOR THE PLAINTIFFS

2 McKinney & Stringer
3 Corporate Tower
4 101 North Robinson, Suite 1300
Oklahoma City, Oklahoma 73102
(405) 272-1901
5 (405) 239-7902 Fax

6 MR. A. SCOTT McDANIEL FOR THE DEFENDANT,
Joyce, Paul & McDaniel, P.C. PETERSON FARMS,
7 111 West Fifth Street, Suite 500 INC.
Tulsa, Oklahoma 74103
8 (918) 599-0700
(918) 732-5370 Fax

9 MS. THERESA NOBLE HILL FOR THE DEFENDANT,
10 Rhodes, Hieronymus, Jones, CARGILL, INC.
Tucker & Gable, P.L.L.C.
11 100 West Fifth Street, Suite 400
Tulsa, Oklahoma 74103-4287
12 (918) 582-1173
(918) 592-3390 Fax

13 MS. LINDA C. MARTIN FOR THE CITY OF
14 Doerner, Saunders, Daniel & Anderson DECATUR, ARKANSAS



holcom-1.txt

22 A. Tuesday.
 23 Q. Okay, sir.
 24 A. Last Tuesday.
 25 Q. About how long did you spend there?
 0005
 1 A. Probably two hours.
 2 Q. Who all was present besides Mr. McDaniel?
 3 A. Janet Wilkerson.
 4 Q. Anyone else?
 5 A. No.
 6 Q. Okay. Are you employed by Peterson in any respect?
 7 A. On a limited part-time basis.
 8 Q. And what is your title or -- Tell me about that
 9 part-time basis.
 10 A. The title is probably somewhat misleading. I was
 11 hired beginning of February, like I say, on a limited
 12 part-time bases mainly to deal with water quality issues
 13 and environmental issues that -- and attend meetings that
 14 were having effect with the poultry industry for Peterson
 15 Farms.
 16 Q. So you are an employee of Peterson's?
 17 A. Part-time.
 18 Q. How many -- Do you have regular hours?
 19 A. No, sir.
 20 Q. How many hours a week do you work in that capacity?
 21 A. Without going back and looking at the records, I
 22 doubt that I have worked a total of ten hours a month.
 23 Like I say, it's very limited.
 24 Q. Who do you report to in that capacity?
 25 A. Would be Janet Wilkerson.

0006
 1 Q. And was this a job that was filled by someone else,
 2 to your understanding, before you were hired part-time?
 3 A. No, sir, not to my understanding.
 4 Q. Is this a -- a position that was created more or
 5 less when -- when they hired you?
 6 A. Yes.
 7 Q. And does it have an official title or name?
 8 A. I think they've got it listed as environmental
 9 employee, I believe is the way it's listed. Environmental
 10 issues maybe.
 11 Q. Okay, sir. And what is your compensation
 12 arrangement for that job?
 13 A. It's an hourly fee.
 14 Q. And what is that?
 15 A. \$20 an hour.
 16 Q. When you were hired, what were your -- how were your
 17 duties explained to you?
 18 A. What we had discussed was that as water quality
 19 issues came up, as meetings came up pertaining to water
 20 quality or environmental issues, I would probably attend
 21 those meetings and bring that information back to the
 22 company and dispense that information to them. Usually
 23 that came back to Janet, and then they would take that
 24 information and do whatever they needed to, you know, and
 25 make their decisions with it.

0007
 1 Q. And is your job limited solely to meeting with
 2 out -- in outside meetings or conferences or wherever
 3 water quality issues are the subject?
 4 A. That's the basics, yes. There will be some meetings
 5 that take place there at the office, but the majority of
 6 it has been travel meetings.

COPY OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE CITY OF TULSA AND TULSA
METROPOLITAN UTILITY AUTHORITY,

Plaintiff,

vs.

No. 01CV0900B(C)

PETERSON FARMS, INC.; TYSON FOODS, INC.;
GEORGE'S, INC.; COBB-VANTRESS, INC.;
CARGILL, INC.; SIMMONS FOODS, INC.; CITY
OF DECATUR, ARKANSAS,

Defendants.

DEPOSITION OF WESLEY M. JARRELL

TAKEN ON BEHALF OF THE DEFENDANTS

ON NOVEMBER 5, 2002, BEGINNING AT 8:40 A.M.

IN TULSA, OKLAHOMA

APPEARANCES:

MR. KENNETH N. McKINNEY, Attorney at law, of The
firm McKINNEY & STRINGER, 101 North Robinson, Suite 1300,
Oklahoma City, Oklahoma 73102, appeared for the PLAINTIFF.

MR. JOHN ELROD, Attorney at Law, of the CONNER &
WINTERS firm, Suite 200, 100 West Center Street, Fayetteville,
Arkansas 72701-6081, appeared for the DEFENDANT SIMMONS
FOODS.

REPORTED BY: KATHERINE A. POWELL, CSR, RPR, CRR

Oklahoma City, OK
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EXHIBIT

2

WESLEY M. JARRELL - 11/5/02

17

1 Then when I went to Riverside in '65, they
2 were in the middle of nitrate work down there.
3 They were early, but then phosphorous faded out
4 in the late '70s, nitrate came in and has been a
5 fairly dominant issue for some time.

6 Now there's a realization, and I think in
7 part it's because we have better tools for
8 understanding phosphorous than we ever had in
9 the earlier days.

10 Q What has happened in science that has
11 given us better tools to understand phosphorous?

12 A Well, the way we've looked at it, at least
13 in our program, is geographic information
14 systems, for example, GIS lets you look at the
15 whole landscape, understand elements of it like
16 slope, land management, soil type, where the
17 water is, how much is coming out.

18 Computer modeling has certainly been an
19 element that's something that wasn't particularly
20 available 20 years ago, 30 years ago.

21 Q From your viewpoint, Dr. Jarrell, in the
22 last 20 years has there been a particular scientist
23 who has been a crusader for phosphorous?

24 A Well, the name that pops up all the time
25 is Sharpley.

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WESLEY M. ARRELL - 11/5/02

1 number of those who will go into cash grains.

2 And a lot of those farmers value the
3 nitrogen material and the phosphorous and the
4 organic matter that they're getting out of the
5 manure.

6 Q There's been a lot of talk in Oklahoma
7 and Arkansas about something called a litter
8 bank, which is nothing more than an informatio
9 system for potential buyers and so on for chicke
10 litter can come together, for instance. Is the sa
11 sort of thing going on in Wisconsin in terms of
12 dairy manure?

13 A That's a great idea. I haven't seen that
14 level of development yet. My wife is actually
15 working on some approaches that are similar to
16 that in trying to get people who produce organic
17 waste materials of all kinds to join together and
18 try to create value-added products that are real
19 beneficial.

20 Q Is there an equivalent of a phosphorou
21 index in the Wisconsin regulatory scheme?

22 A Right. The 590 standard has a
23 phosphorous index.

24 Q And that's actually in play right now in
25 Wisconsin?

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WESLEY M. JARRELL - 11/5/02

23

1 A It's not -- when the 590 standard becomes
2 in effect, it will be in play. But that's -- initially,
3 it was anticipated it would be this year, but it
4 looks like it's pushed forward a couple of years.

5 Q Are there any other standards, other than
6 a phosphorous index, that would tell a farmer
7 whether or not he or she can apply animal manure
8 to a particular field?

9 A Right. The way the 590 was written this
10 round, it also includes a soil test phosphorous
11 option.

12 Q Is that in play yet?

13 A No. Neither one are because the 590
14 isn't.

15 Q So right now it's totally laissez-faire?

16 A It is. It is. Yeah, as far as I'm aware,
17 it's nitrogen-based still, which is the old
18 standard.

19 Q But there is, then, some regulation that
20 could prohibit a farmer from applying to a
21 particular field animal manure?

22 A If -- when the 590 standard, if it gets
23 inserted into the Department of Ag regulation, it
24 would be.

25 Q So it's still something yet to come?

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WESLEY M. RRELL - 11/5/02

1 A That's correct. But there's an anticipa
2 date that looks relatively firm. The 590 was in
3 process when the last set of rules went through,
4 so it wasn't yet finalized. And they were not --
5 did not want, for good reason, to accept something
6 that wasn't finalized as the standard.

7 So our ideal is to work the next two year
8 very hard to get the phosphorous index more
9 validated over a wide range of areas and tested to
10 determine if it's doing its job.

11 Q Is there general acceptance among the
12 agricultural community that it is time to start
13 dealing with these kinds of issues?

14 A I would characterize it as reluctant
15 acceptance in many cases.

16 Q That's a good term. I like that.

17 A It's not embraced fully, but there's a
18 realization that it's coming and that the best way
19 to deal with it -- and that's what Discovery Farms
20 are trying to do, I think, is to get out ahead of it
21 and be able to say this is what is happening on
22 the farm and this is what's happening with the
23 environment, and these are the benefits and cost
24 of the BMP's, for example, that you're asking us to
25 do, or sometimes telling us to do.

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405.272.1006



Tulsa, OK
918.583.8600

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA

3 THE CITY OF TULSA, and THE)
4 TULSA METROPOLITAN UTILITY)
5 AUTHORITY,)

 Plaintiffs,)

6 vs.)

Case No. 01-CV-0900-B(C)

7 TYSON FOODS, INC.,)
8 COBB-VANTRESS, INC., PETERSON)
9 FARMS, INC., SIMMONS FOODS, INC.,)
10 CARGILL, INC., GEORGE'S INC.,)
11 and THE CITY OF DECATUR, ARKANSAS,)

12 Defendants.)

13 THE DEPOSITION OF BILLY B. TUCKER, Ph.D.,

14 taken on behalf of the Plaintiffs, pursuant to
15 agreement of the parties, on the 14th day of November
16 2002 at the law offices of Rhodes, Hieronymus, Jones,
17 Tucker & Gable, 400 ONEOK Plaza, Tulsa,
18 Oklahoma, 74103, before Elizabeth Roy Rockett,
19 Certified Shorthand Reporter in and for the States of
20 Oklahoma and New York.

21 A p p e a r a n c e s

22 For the Plaintiffs: MR. KENNETH N. MC KINNEY, ESQ.
23 MR. ROBERT L. ROARK, ESQ.
24 McKinney & Stringer
25 Suite 1300
 101 North Robinson
 Oklahoma City, Oklahoma

EXHIBIT

3

1 of crops and it ought to be recycled and used.

2 Q. In a form that doesn't hurt water supplies?

3 A. Yes.

4 Q. Do you, even though you would say it differently, can
5 you see that this is a statement that a competent scientist
6 could make?

7 A. They did.

8 Q. The next paragraph starts out saying, "Several states
9 have proposed standards that would limit manure
10 application..." and so forth. It goes on to say standards
11 may be based on nutrient utilization where manure is
12 applied to meet phosphorus required for crop production.
13 First, do you think that's accurate and correct?

14 A. Yes.

15 Q. It goes on to say, "Standards based on waste disposal
16 exceed nutrient phosphorus crop requirement and allow for
17 some buildup of soil phosphorus. Do you think that's
18 correct?

19 A. I really don't understand the sentence standards based
20 upon waste disposal exceed nutrient P crop requirement or
21 the standards do allow for some buildup of soil. That's
22 correct.

23 Q. If an application is in excess of plant needs, then
24 it's being called here a waste disposal rather than a
25 beneficial use?

1 A. Runoff from water?

2 Q. Runoff water, yes.

3 A. You can get runoff from water, but I don't think you
4 carry the material. It's all the way to the creek.

5 Q. You don't?

6 A. Not generally.

7 Q. Let's say people think the weather is going to be nice
8 and dry. You see how they spread this dusty, dry chicken
9 manure on the field, haven't you?

10 A. Yes.

11 Q. You just take a truck and kind of spread it around.
12 You've seen it blow around and everything else when they're
13 applying it; does it not?

14 A. I haven't seen it -- I have seen it, you know, the
15 dust blow out from it. But the manure itself dropped to
16 the ground when I saw it.

17 Q. So if the weatherman happens to be wrong that week and
18 a few days later if there's a pretty good rainfall, then
19 why is it that the runoff is not going to carry with it
20 some of that soluble feed that's been put right on top of
21 the soil?

22 A. Over the soluble P?

23 Q. Yes, sir.

24 A. I thought you were talking about the P in the --

25 Q. The high STP in, down in the soil itself?

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA

3 THE CITY OF TULSA, THE)
4 TULSA METROPOLITAN)
5 UTILITY AUTHORITY,)

6 Plaintiffs,)

No. 01 CV 0900B(X)

7 vs.)

VIDEOTAPED
DEPOSITION OF

8 TYSON FOODS, INC.,)
9 COBB-VANTRESS, INC.,)
10 PETERSON FARMS, INC.,)
11 SIMMONS FOODS, INC.,)
12 CARGILL, INC., GEORGE'S,)
13 INC., CITY OF DECATOR,)
14 ARKANSAS,)

RONALD J. MULLIKIN

15 Defendants.)
16 -----)

COPY

17 THE VIDEOTAPED DEPOSITION OF RONALD J.
18 MULLIKIN, taken before Karen J. Eichmann,
19 Certified Shorthand Reporter and Notary Public
20 of the State of Iowa, commencing at 12:02 p.m.,
21 on the 18th day of July, 2002, at 421 West
22 Broadway, Suite 405, Council Bluffs, Iowa.

23
24 Reported by: Karen J. Eichmann, C.S.R.
25

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EXHIBIT

4

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 regional sales manager.

2 Q. Where was your store as assistant
3 manager?

4 A. I was in Cross Lanes, West Virginia;
5 Freehold, New Jersey; Waterloo, Iowa.

6 Q. Then why did you leave them and go to
7 Peterson?

8 A. Well, I left them for health reasons
9 and because I wanted to live back in northwest
10 Iowa. I didn't leave -- or northwest Arkansas.
11 I didn't leave them because I wanted to go to
12 work for Peterson. I left them really without
13 having another job to go to and just took a
14 short sabbatical and then found the position at
15 Peterson.

16 Q. And started with Peterson when?

17 A. I believe it was in November of I
18 believe it was '97.

19 Q. And when did you leave Peterson?

20 A. Would have been in August of 2000, and
21 I think those dates are close.

22 Q. Then you left Peterson and went back
23 with Wal-Mart.

24 A. That's correct.

25 Q. What's the reason that you left

17
ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 of the divisions to the other.

2 Q. And you anticipate your position back
3 in the home office will be what?

4 A. Most likely with Sam's Club. There's a
5 couple of different things that we are
6 negotiating on right now. I don't know exactly
7 which position it will be that they finally put
8 me in.

9 Q. So you can't tell me what your function
10 will be then?

11 A. No.

12 Q. How would you rate your tenure with
13 Peterson Farms as far as job satisfaction and
14 things of that sort?

15 A. I enjoyed it. I especially enjoyed the
16 environmental side of it, and I think it's
17 because of my agricultural roots. Enjoyed the
18 human resources part of it also. And the part
19 that I was originally hired for, which was to be
20 the director of training, I got to the point
21 where we had people trained that did most of
22 that; and I wasn't nearly as involved with it.

23 Q. So after that point you moved more into
24 the environmental side?

25 A. Uh-huh.

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 Q. Did you actually pick up an
2 environmental title at that point?

3 A. I had the title of director of
4 environmental affairs.

5 Q. From inception or later on?

6 A. No, later on.

7 Q. So at first director of training?

8 A. Uh-huh.

9 Q. And then after how long?

10 A. I would have said that it would be
11 probably six to nine months.

12 Q. So sometime you are thinking in mid or
13 so 1998, you're named director of environmental
14 affairs, did you say?

15 A. That became -- that became more of what
16 I did. My involvement with the environment
17 started out with being asked to simply attend a
18 meeting and come back and report on what my
19 feelings were. As I gained a better
20 understanding of it and I think their comfort
21 level with what I was doing and seeing grew,
22 that is when they said to go ahead and dedicate
23 more time to that.

24 Q. Was there a function in the company
25 with that title before?

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 area once you took over?

2 A. Uh-huh.

3 Q. Did those people report to you for
4 environmental issues?

5 A. No. On many occasions I went to them
6 for help just because I don't have a background
7 in the poultry industry.

8 Q. But you did coordinate and work
9 together with them after you became the
10 director?

11 A. Yes.

12 Q. How would you describe Peterson Farms
13 insofar as a commitment to environmental issues?

14 A. I would say that it was a huge concern.

15 Q. From the first when you became familiar
16 with it?

17 A. I would have to say so or they wouldn't
18 have put me in that position and started sending
19 me to those meetings.

20 Q. What was the first meeting that you
21 went to that you said sort of led to this
22 assignment?

23 A. It was a meeting, and I don't recall
24 the date, but it was a meeting at John Brown
25 University. No, I take it back. It was at

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 Simmons Foods that we attended in Siloam
2 Springs.

3 Q. A meeting at the Simmons Food facility?

4 A. Uh-huh, with integrators. There were
5 people there from the state of Arkansas. There
6 were people there from the USDA, people from
7 Oklahoma, people from the University of
8 Oklahoma, OU.

9 Q. OSU?

10 A. Yes.

11 Q. Are you saying both OU and OSU?

12 A. Yes.

13 Q. Approximately when was that meeting?

14 A. I would have to -- and this is a guess.
15 Let's say that it was probably in February or
16 March of '98.

17 Q. Three or four months after you had been
18 with the company?

19 A. Uh-huh.

20 Q. What was your understanding of the
21 purpose of the meeting?

22 A. Was to discuss the growing issue of
23 poultry litter and concerns over problems that
24 it could be creating.

25 Q. Primarily problems in watersheds?

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 A. Uh-huh.

2 Q. And was the Spavinaw watershed one of
3 those areas that was being discussed?

4 A. I don't recall it being talked about
5 specifically. There were a number of watersheds
6 and a number of things that were discussed, and
7 I don't -- I don't recall the total content of
8 the meeting.

9 Q. What did you bring away from that
10 meeting? What kind of knowledge or feeling
11 about this area?

12 A. Mr. McKinney, my first feeling, if I
13 remember correctly, was one of confusion
14 because the ideas the people had, the
15 perceptions is probably the best way to put it,
16 no one could really substantiate. There was
17 nothing really clear and decisive about what
18 everybody was talking about.

19 Through my years in the
20 fertilizer business, my understanding the
21 properties and the way that phosphate, for
22 instance, acts and reacts in the soil was
23 somewhat different than what I was hearing at
24 those meetings.

25 Q. What had been your understanding and --

29
ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 again.

2 Q. What typ of soil would be able to
3 sustain that type of phosphorus load?

4 A. I couldn't tell you.

5 Q. What impressions did you come out of
6 this initial meeting at Simmons Foods with?

7 MS. BARTLEY: Object to form.

8 A. What I recall, once again, from that
9 first meeting is one of almost confusion trying
10 to understand what the problem was, what all the
11 determining factors, what all the inputs were.
12 And then I recall sitting down with Janet
13 Wilkerson and us talking about what our role was
14 or might be in the issues that were being spoken
15 about.

16 Q. And Ms. Wilkerson's role was what, her
17 function?

18 A. She was the vice president that I
19 answered to. She was my direct report.

20 Q. What was her title? Vice president?

21 A. She was vice president of human
22 resources.

23 Q. And in your training function, you had
24 been reporting to her?

25 A. That's correct.

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 annual litter from a typical broiler house of
2 22,000 birds contains as much phosphorus as is
3 in the sewage from a community of 6,000 people."
4 Have you seen analyses and comparisons like
5 that?

6 A. I have seen comparisons. I don't know
7 if that number is correct or not.

8 Q. Would that surprise you to see that
9 kind of a comparison?

10 A. The comparison wouldn't, but there's so
11 many factors that go into it. I mean, that
12 statement really simplifies it. The different
13 feeds that they have has a tremendous impact on
14 the amount of phosphate, for instance, what the
15 ingredients are; and it's a pretty general
16 statement.

17 Q. Would you look at page 4. I think it's
18 the next page maybe, at the bottom talking about
19 environmental impact. They first talk about
20 spills directly into the water have an impact.
21 It goes on to say, "In addition, the excessive
22 growth and decay of algae and other aquatic
23 organisms that feed on excessive nutrients in
24 water deplete dissolved oxygen. The resulting
25 hypoxia (low oxygen) from chronic nutrient

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 enrichment can result in fish kills, odor and
2 overall degradation of water quality." Do you
3 agree with that statement, Mr. Mullikin?

4 A. Based on what I know, yes.

5 Q. Did you know that in February of 1998
6 when you started this job?

7 A. Yes.

8 Q. Even then you knew that?

9 A. Yes.

10 Q. And looking on page 6 under human
11 health concerns it talks about the aquatic
12 ecosystems and then goes on to say, "But there
13 are also human health concerns associated with
14 animal waste pollution that should be studied
15 further." Have you learned that that is
16 true?

17 A. I would agree with that.

18 Q. And has that been discussed by any of
19 the officers of Peterson Farms?

20 A. Not in discussions that I was in with
21 them.

22 Q. Look on page 21, if you would please,
23 which I think is a description of the parts of
24 the Animal Agriculture Reform Act.

25 Incidentally, did Peterson support or fight this

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 earlier, I take it?

2 A. Uh-huh.

3 Q. Were you requested to write a memo
4 bringing people up to date?

5 A. At times. I don't recall if in this
6 case I was; but at times Ms. Wilkerson would
7 say, you know, why don't you shoot us something
8 so that we all know where you are at and what
9 all is going on.

10 Q. If we could look at the second
11 paragraph of your memo, you say, "I personally
12 have no opinion on whether or not the integrator
13 or the grower owns the litter." Was this
14 because you had heard the argument that we spoke
15 about earlier that since the integrator owns the
16 chicken and the feed and the bird, then it
17 follows they really should own the litter too?

18 MS. BARTLEY: Object to form.

19 A. I think the statement there was one
20 where I didn't feel equipped, didn't feel like I
21 knew enough about everything that was going on
22 to have an opinion about it.

23 Q. Okay. And then you go on to say, "I do
24 feel, without any doubt, that as time passes, we
25 the integrator will be found to be liable for it

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 meeting?

2 A. The 300 pounds was an arbitrary number.
3 It was a number that, once again, not based on
4 science. It was a number that someone -- I
5 don't recall if it was the NRCS. I don't recall
6 if it was the extension service, whether it
7 was -- I think in the state of Oklahoma it was
8 mandated by legislation. But this 300 pounds
9 was a number that was set forth so that -- as I
10 state there, I believe there was only one
11 Peterson farm grower that was able to write his
12 plan because of that 300-pound threshold.

13 Q. Or apply any litter on his fields?

14 A. I would agree.

15 MS. BARTLEY: Object to form.

16 Q. Is that correct?

17 A. Yes.

18 Q. And you concluded that paragraph
19 saying, "We need to continue to support anything
20 we can to help our growers find ways to dispose
21 of their litter." Do you firmly believe that?

22 A. Yes.

23 Q. By the time you left, had the company
24 done anything to help its growers dispose of
25 litter?